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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

**W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,**
Petitioner

V.

JERRY LANE JUREK,
Respondent

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITION FOR CERTIORARI AND APPENDIX (Part I)

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QUESTIONS PRESENTED

I. Whether the threshold requirements of 28 U.S.C. §2254(d) must be met before voluntariness of confessions may be considered.

II. What is the proper standard for review on habeas corpus of voluntariness of confessions? Should the the "independent review" or the "clearly erroneous" standard be applied to the findings of the state courts and federal court?

III. Does the Sixth Amendment require appointment of counsel during interrogation when the defendant repeatedly disavows a desire for counsel?

IV. Were the constitutional standards of the Fifth, Sixth and Fourteenth Amendments correctly applied to the undisputed facts in this case?

V. If a voluntary confession supports the jury verdict beyond a reasonable doubt, is the admission of an additional involuntary confession harmless error?

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OCTOBER TERM, 1980

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

JERRY LANE JUREK,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 11, 1980.

OPINION BELOW

The opinion of the Court of Appeals is reported at 623 F.2d 929 (5th Cir. 1980) and appears as Appendix A. The vacated panel opinion appears as Appendix C. The unreported, memorandum opinion of the United States District Court for the Southern District of Texas appears as Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 11, 1980. This petition for certiorari was entered on August 11, 1980. This petition for certiorari was filed with 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, art. V., in pertinent part:

> "nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;. . ."

United States Constitution, art. VI, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.. .and to have Assistance of Counsel for defense."

United States Constitution, art. XIV, §1, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

28 U.S.C. §2254(d), in pertinent part:

> "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the

judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) That the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) That the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the state court proceeding;

> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the federal court on a consideration of such part of the record as whole concludes that such factual determination is not fairly supported by the record:
>
> And in an evidentiary hearing in the proceeding in the federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectfully set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

Respondent was indicted by the grand jury in DeWitt County, Texas, for the capital murder of Wendy Adams, alleged to have occured on or about the 17th day of August, 1973. The jury returned a verdict of guilty of capital murder on February 1, 1974. On February 2, 1974, the jury returned unanimous affirmative answers to the special issues on punishment. Judgment of the sentence of death was delivered on February 27, 1974. Respondent gave notice of appeal to the Texas Court of Criminal Appeals. That court affirmed the appeal on

April 16, 1975. Motion for Leave to File Motion for Rehearing was denied on May 7, 1975. *Jurek v. State*, 522 S.W.2d 934 (Tex.Crim.App. 1975).

Respondent filed a petition for writ of certiorari to the Supreme Court of the United States contesting the constitutionality of the Texas Capital Punishment Statute and the voluntariness of his confessions. Certiorari was granted only as to the constitutionality of the statutes. *Jurek v. Texas*, 423 U.S. 1082 (1976), *cert. granted.* On July 2, 1976, this Court affirmed the Respondent's conviction. *Jurek v. Texas*, 428 U.S. 262 (1976). On October 19, 1976, this Court denied rehearing and vacated its prior order staying issuance of the mandate. *Jurek v. Texas*, 429 U.S. 1082 (1976).

On October 19, 1976, Respondent was formally sentenced by the state trial court to death. A petition for writ of habeas corpus and application for stay of execution were submitted to the trial court on January 10, 1977. On January 11, 1977, an identical application was submitted to the Texas Court of Criminal Appeals. The habeas corpus relief was denied on January 11, 1977. On January 12, 1977, Respondent filed an application for stay of execution in the Supreme Court of the United States. On January 13, 1977, Respondent filed an application for a stay of execution and an application for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Southern District of Texas, Victoria Division. On January 17, 1977, this Court granted a stay of execution pending timely filing of a petition for writ of certiorari. On March 28, 1977, this Court denied certiorari but continued the stay of execution until April 4, 1977. *Jurek v. Estelle*, 430 U.S. 951 (1977). The United States District Court then granted a stay of execution for Respondent on March 30, 1977. On April 11, 1977, Respondent filed an amendment petition for writ of habeas corpus. An evidentiary hearing was conducted on August 1, 1977. At that hearing, Respondent called four witnesses to testify. They were Lawrence S.

Schoenfeld, Russell L. Adams, Lawrence Taylor, who who performed a psychological evaluation of Jurek, and Emmett T. Summer, a lawyer who assisted in the trial defense. Petitioner called the trial defense lawyer George Middaugh. On January 24, 1978, the district court entered an order and memorandum opinion denying the writ of habeas corpus and finding Petitioner's confessions to have been voluntary. That order is attached as Appendix C.

Respondent received a stay of execution from the United States Court of Appeals for the Fifth Circuit pending appeal. Rehearing en banc was granted by the United States Court of Appeals on June 5, 1979, vacating the panel decision which was handed down on April 23, 1979. The en banc decision which is reported as *Jurek v. Estelle*, 623 F.2d 929 (5th Cir. 1980) and is attached as Appendix A reversed the judgment of the district court and remanded the cause with directions to grant the writ of habeas corpus instructing that Respondent Jurek be tried without use of the second written confession.

The majority opinion of the en banc court was written by Judge Garza and was joined by three other judges. That opinion found that Respondent Jurek's first written confession was voluntary and admissible but that his second written confession was involuntary and therefore inadmissible. Judge Godbold concurred specially and filed an opinion joined by one other circuit judge finding both written confessions involuntary and inadmissible but the oral confession voluntary and admissible. Judge Frank M. Johnson, Jr., concurred specially and filed an opinion joined by six judges in which he found all confessions, written and oral, involuntary and inadmissible. Judge Brown concurred in part and dissented in part and filed an opinion in which ten other judges joined finding all confessions voluntary and admissible. Judge Reavley dissented and filed an opinion in which seven judges joined contesting the majority opinion's analysis of the facts as previously

found. Therefore, since fifteen judges agreed that the first written confession was voluntary and admissible, that holding stood for the majority of the court. Seventeen judges believed that the oral confessions were voluntary and admissible. Thirteen judges believed that the second confession was involuntary and therefore inadmissible. None of the judges reached the issue of harmless error if the first confession was voluntary and the second confession was involuntary. It is from these opinions that this petition for certiorari is taken.

REASONS FOR GRANTING THE WRIT

I.

THE OPINIONS BELOW FAIL TO AGREE ON THE PROPER STANDARD TO BE APPLIED IN FEDERAL HABEAS CORPUS FOR A DETERMINATION OF VOLUNTARINESS OF A CONFESSION.

The issue of voluntariness of the confession in this cause was litigated in state court and the confessions were found to be voluntary. On direct appeal to the Texas Court of Criminal Appeals, this issue was once again considered and the confessions were found to be voluntary. *Jurek v. State*, 522 S.W.2d 934 (Tex.Crim.App. 1975). The petition for certiorari on this issue was denied. *Jurek v. Texas*, 423 U.S. 1082 (1976). The federal district court gave Respondent the opportunity to present evidence as to the voluntariness of his confessions although he had not raised an exeption to the rules provided in 28 U.S.C. §2254(d). That court found the confessions to be voluntary.

One segment of the United States Court of Appeals for the Fifth Circuit found that the proper standard to be applied was a standard of independent review, notwithstanding the prior findings. (Opinions of Judge Garza and Judge Frank M. Johnson, Jr.). Another segment of the court was unable to take a firm stand

concerning the proper standard of review. (See, Opinion by Judge Brown, Appendix A-58-71).

Although the circuit judges differ in their analysis as to whether the "clearly erroneous" standard should apply or the "independent review" standard should apply, none of the judges addressed the application of 28 U.S.C. §2254(d) as to whether the determination should be made. Under the standard set forth in *Procunier v. Atchley*, 400 U.S. 446 (1971), there should be a threshold determination whether the Respondent would be entitled to relief if his allegations were to be believed. This standard was never applied. In viewing the threshold determination it is significant that Jerry Lane Jurek has never taken the stand or asserted personally that his confession was in any way involuntary.

Certiorari should be granted in this cause to consider and clarify the proper standard for review of voluntariness of a confession in the context of 28 U.S.C. §2254.

II.

EVEN APPLYING THE INDEPENDENT REVIEW STANDARD THE MAJORITY OF THE COURT OF APPEALS ERRONEOUSLY DETERMINED THAT THE SECOND CONFESSION WAS INVOLUNTARY.

The State, while not conceding that Respondent alleged or proved sufficient new facts to require reversal, believes that the confessions were voluntary. The second confession was found to be involuntary principly because of the pre-confession conduct of the police and prosecuting attorneys and Respondent Jurek's limited mental capacity. In the opinion concurring in part and dissenting in part, Judge Brown thoroughly discussed all of the facts elicited in evidence both at the state trial and the federal habeas corpus proceedings. After this lengthy analysis eleven judges found that all of the confessions were voluntary.

Petitioner agrees with the undisputed facts set forth in the opinion of Judge Brown.

The opinion by Judge Garza indicated that the second confession was involuntary since Jurek did not have an attorney for the second confession. That opinion indicates that an attorney should be appointed in spite of a defendant's assertion that he does not want an attorney. The record reflects that Jurek was thoroughly warned and advised of the right to have an attorney and was repeatedly asked if he wanted an attorney. Further, one of the witnesses to the confession was an attorney and additionally warned Jurek of his rights. The Constitution does not require that an attorney be appointed for a defendant who does not desire counsel. *See, Faretta v. California*, 422 U.S. 806 (1975).

The opinion by Judge Johnson re-evaluated the case and concluded that "each [confession] was the result of frequent interrogation, carried on by a number of questioners, often at odd hours and in secluded places, that continued in the face of Jurek's evident unwillingness to admit guilt. The authorities responsible displayed an intentional disregard of state law. At the time the confessions were obtained, Jurek was apparently weak from lack of food and sleep, isolated from family, friends, and legal counsel, and in legitimate apprehension of imminent physical harm."

There are no facts in the record to support these allegations nor has any evidence been presented by Jurek nor by his attorneys when given the opportunity at the federal district court hearing to prove these conclusions by this segment of the court.

The evidence in the record shows that Jurek stated he was not in any way coerced into making the confessions. (Appendix A-108-112). One of the witnesses to the confessions stated "I don't think there was any doubt in the boy's mind that evening but what he knew what he was signing and the consequences of signing." (Tr., Vol. IV,

1415). Although Jurek had been in custody the evidence is undisputed that at the time of the second confession he was fresh and alert. (Tr. Vol. VI, 1331, 1336-37). There is *no* evidence anywhere in the record of physical violence, coercion, or threats to Jurek.

Certiorari should be granted in that a majority of judges on the Court of Appeals incorrectly applied the standards of the Fifth and Sixth Amendments to the United States Constitution in finding the second written confession involuntary.

III.

IF THE SECOND WRITTEN CONFESSION WAS INVOLUNTARY, THE ERROR IS HARMLESS.

A majority of the court below found the first written confession to be voluntary. In that confession Jurek confessed to the murder and confessed to the attempted kidnapping of Wendy Adams. This evidence was sufficient to support the jury's findings of capital murder during the course of attempting to commit kidnapping. Therefore, the error, if any, in the admission of the second written confession in which Jurek also admitted attempted rape is rendered harmless since the evidence, including the first written confession, was sufficient to support the jury's findings. *See, Jackson v. Virginia*, 443 U.S. 307 (1979).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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Jerry Lane JUREK,
Petitioner-Appellant,

v.

W. J. ESTELLE, Jr., Director, Texas Department of Corrections,
Respondent-Appellee.

No. 78-1374.

United States Court of Appeals,
Fifth Circuit.

Aug. 11, 1980.

Petitioner, who was convicted of capital murder and sentenced to death in state court, petitioned for writ of habeas corpus. The United States District Court for the Southern District of Texas, Owen D. Cox, J., denied the petition, and appeal was taken. The United States Court of Appeals for the Fifth Circuit, Goldberg, Circuit Judge, 593 F.2d 672, reversed and remanded. On rehearing en banc, the Court of Appeals, Garza, Circuit Judge, held that defendant's first confession was voluntarily given and was properly admitted at trial, but defendant's second confession was involuntarily given and its use at trial was improper.

Reversed and remanded with directions.

Godbold, Circuit Judge, concurred specially and filed opinion in which Alvin B. Rubin, Circuit Judge, concurred.

Frank M. Johnson, Jr., Circuit Judge, concurred specially and filed opinion in which Kravitch, Hatchett, Anderson, Randall, Tate and Thomas A. Clark, Circuit Judges, joined.

Brown, Circuit Judge, concurred in part and dissented in part and filed opinion in which Coleman, Chief Judge, and Ainsworth, Charles Clark, Gee,

Tjoflat, Hill, Fay, Vance, Henderson and Reavley, Circuit Judges, joined.

Reavley, Circuit Judge, dissented and filed opinion in which Coleman, Chief Judge, and Brown, Tjoflat, Ainsworth, Charles Clark, Gee and Fay, Circuit Judges, joined.

Appeal from the United States District Court for the Southern District of Texas.

Before COLEMAN, Chief Judge, BROWN, AINSWORTH, GODBOLD, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, and THOMAS A. CLARK, Circuit Judges.*

GARZA, Circuit Judge:

We have gathered en banc to consider the circumstances surrounding the arrest, interrogation, confession, and trial of Jerry Lane Jurek, convicted of murder and sentenced to death in a Texas state district court. A panel of this Court has reversed a federal district court's denial of Jurek's petition for a writ of habeas corpus. *Jurek v. Estelle*, 593 F.2d 672 (5th Cir. 1979). The panel majority based its decision upon conclusions that Jurek's two confessions were

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*Judge Goldberg, was a member of the en banc court under 28 U.S.C. § 46(c) and participated in the oral argument of the case en banc. Since that time he has taken senior status and therefore does not participate in the consideration or decision of this case. Judge Jerre S. Williams did not participate in the oral argument and the conference on this case and, therefore, does not participate in this decision.

involuntary, and that the exclusion of certain veniremen at his trial contravened the rule of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 766 (1968). A new trial was held to be required.

On reconsideration en banc, we have concluded that Jurek's first confession was voluntarily given, and that it may constitutionally be admitted in a new trial. We have also concluded that the second confession was involuntarily given, and may not be used.[1] Grounding our decision on those bases, we need not and do not reach the *Witherspoon* issue.

THE STANDARD OF REVIEW

We are met at the outset with questions relating to the standard of review. In considering a district court's denial of habeas corpus relief sought on the ground of an admitted confession's involuntariness, must we accept the findings of the district court unless clearly erroneous? If there were no specific findings on crucial issues, what is our role? These questions arise from a collision of authorities.

On one hand, the Supreme Court has frequently stated that it is our affirmative duty "to examine the entire record and make an independent determination

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[1]A majority of the judges on this en banc court have determined that the first confession was voluntary; a majority have determined that the second confession was involuntary, mandating the reversal of the district court, the granting of habeas corpus, and the inadmissibility of the second confession in any subsequent retrial of Jurek. This opinion speaks for the majority of the court on each issue. Judges BROWN and REAVLEY have filed separate opinions, joined by those listed therein, in which they dissent in part on the ground that the second confession should also be held voluntary and admissible; they would accordingly affirm the district court. Judges GODBOLD and FRANK M. JOHNSON, JR. have also filed separate opinions, joined by those listed, in which they dissent in part on the ground that the first confession should be involuntary and inadmissible.

of the ultimate issue of voluntariness." *Beckwith v. United States*, 425 U.S. 341, 348, 96 S.Ct. 1612, 1617, 48 L.Ed.2d 1 (1976). *See also Davis v. North Carolina*, 384 U.S. 737, 741-42, 86 S.Ct. 1761, 1764, 16 L.Ed.2d 895 (1966); *Haynes v. Washington*, 373 U.S. 503, 515-16, 83 S.Ct. 1336, 1344, 10 L.Ed.2d 513 (1963); *Spano v. New York*, 360 U.S. 315, 316, 79 S.Ct. 1202, 1203, 3 L.Ed.2d 1265 (1959); *Ashcraft v. Tennessee*, 322 U.S. 143, 147-48, 64 S.Ct. 921, 923, 88 L.Ed. 1192 (1944); *Lisenba v. California*, 314 U.S. 219, 237, 62 S.Ct. 280, 290, 86 L.Ed. 166 (1941). This duty is not "foreclosed by the finding of a court, or the verdict of a jury, or both." *Lisenba*, 314 U.S. at 237-38, 62 S.Ct. at 290.

On the other hand, we are confronted by the well-established rule that factual questions in habeas corpus proceedings should be determined by the district court and that its factual conclusions are binding on the court of appeals unless clearly erroneous. *Patterson v. United States*, 487 F.2d 341 (5 Cir. 1973); Fed.R.Civ.P. 52, *Accord: United States ex rel. Henne v. Fike*, 563 F.2d 809, 813 (7 Cir. 1977); *Belle v. Gunn*, 532 F.2d 1288, 1291 (9 Cir. 1976); *Leasure v. Lockhart*, 509 F.2d 23, 25 (8 Cir. 1975); *United States ex rel. Marino v. Rundle*, 464 F.2d 149 (3 Cir. 1972); *Zovluck v. United States*, 488 F.2d 339, 341 (2 Cir. 1971); *Monnich v. Kropp*, 408 F.2d 356, 357 (6 Cir. 1969); *Linebarger v. Oklahoma*, 404 F.2d 1092, 1094 (10 Cir. 1968); *Vanater v. Boles*, 377 F.2d 898, 900 (4 Cir. 1967).

The panel majority, citing the opinion of the Supreme Court in *Beckwith, supra*, concluded that "we may overturn the district court's conclusion on [the ultimate issue of voluntariness] even if it is not clearly erroneous." 593 F.2d 672 at 677. Plainly, that is not the law with regard to findings *of fact*. We will not disregard or overturn specific findings of fact made by the district court unless they are clearly erroneous. Pursuant to our duty to examine the *"entire"* record and make an independent appraisal of the voluntariness issue, however, we may, where the district court made no

findings on matters crucial to the ultimate determination, reach into the record and rely on undisputed facts clearly supported therein. If such clarity does not appear, a remand for further findings may be in order. We note as a caveat that where some or all of the evidence was not the live testimony of witnesses, but instead consisted of transcripts, depositions, or documents reviewed by the lower court, the clearly erroneous rule will not apply with full force where "the appellate court is in as good a position as the lower court to evaluate the testimony that is crucial to the case." *Caradelis v. Refineria Panama, S.A.*, 384 F.2d 589, 593 (5 Cir. 1967). Thus, we may draw our own inferences from such evidence. *See Nash v. Estelle*, 597 F.2d 513, 518 (5 Cir. 1979)(en banc). In passing on the ultimate issue of voluntariness, we may substitute our own judgment even in the absence of a conclusion that the district court's ruling was clearly erroneous. No less is required by the admonition of the Supreme Court to make an *"independent"* review.

The facts and procedural history of this case have been oft-recited, yet we must relate them in some detail once more, for the chronology is crucial. Counsel for Jurek have argued that there are no disputed fact issues, and that on the undisputed facts Jurek's confessions were involuntary as a matter of law. It must be noted, however, that in several important areas the findings of fact made by the district court were not comprehensive. The following recital will, where necessary, reach beyond those findings to incorporate undisputed facts which are clearly supported in the record, or portions of the state record and depositions from which we are able to draw our own inferences.

THE FACTS

The victim, ten year old Wendy Adams of Cuero, Texas, disappeared on August 16, 1973. Jurek was awakened at his parent's home at approximately one o'clock on the morning of August 17th by two police

officers acting on a report that she had been seen screaming for help in Jurek's truck as it sped through Cuero. One of the officers was her father, Ronnie Adams. Jurek was questioned briefly, and was read *Miranda* warnings by Adams. He was taken barefoot and without a shirt to the Cuero jail, where he was logged in and placed under arrest at 2:30 a.m. The authorities discovered an outstanding arrest warrant on a "hot check" charge, by which they could hold him.

Jurek was questioned again that morning at about 9:00. At some point, he volunteered to take a polygraph examination. He was taken in the afternoon to Austin, the state capitol approximately 120 miles from Cuero. Upon being tested, he was confronted with results that he had lied. As his counsel stated on oral argument, "he turned to science for help, and science turned him down." Jurek then gave an oral confession of responsibility for Wendy Adams' death, stating that her body had been thrown into the Guadalupe River. While he apparently gave several conflicting versions of the crime, his statement led to the discovery of the girl's body on the next morning. It was the first time that the investigating authorities had learned she was dead.[2]

Jurek was returned to Cuero and taken immediately before a magistrate, Justice of the Peace Albert B. Ley. Judge Ley read him the list of rights printed on a "Magistrate's Certificate" form.[3] Ley testified as to what

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[2]We have no record of precisely what Jurek said at the examination. His counsel does not dispute that an oral confession was made.

[3]Those warnings follow:

> 1.) He was entitled to the services of a lawyer of his own choice to represent and advise him before making any statements or answering any questions by any peace officer or attorney representing the State.

occurred at this interview in the state district court, both at a suppression hearing on the confessions, and at trial. Since the federal district court had before it nothing more than the same transcript of that testimony that we now review, "our interpretation of the interview is unconstrained by the usual strictures of the clearly erroneous standard." *Nash v. Estelle*, 597 F.2d at 518.

At the suppression hearing, Ley testified that Jurek had stated that he understood the rights read to him. In response to a question concerning his knowledge of the Jurek family's financial standing, directed toward ascertaining the reason for the high bond he had set, Ley responded:

> A Well, other than just hearsay of the financial standing of them. I couldn't be positive about the standing of them, other than he did tell me when we talked about it, that—that he could not afford a lawyer and the Court would have to appoint him one. And I said, well, that's what it states in here, that if you are unable and if you sign a pauper's oath, why, then they would set—we would appoint an attorney to represent you.

At trial on the merits, Ley was again questioned as to the appointment of counsel, and the following colloquy

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2.) If he could not afford to hire a lawyer, he could ask for and receive the services of a lawyer appointed to represent and advise him before making any statements or answering any questions by any peace officer or attorney representing the State, without any cost or charge to him.

3). He had the right to remain silent, not to answer any questions or make any statements at all, nor incriminate himself in any manner.

4.) Anything he said could and would be used against him in a court or courts of law for the offense or offenses of which he might be accused.

5.) He could refuse to answer any questions at any time, and he could stop answering questions at any time.

occurred:

> Q All right. When you came to that part of the warning which says that he has the right to have an attorney—
>
> A That's right.
>
> Q —appointed, did you go into that with any detail?
>
> A I went into it with him and asked him if he wanted an attorney with him before I finished reading it. And before I started reading it, I asked him, and he said he didn't just to go ahead and read it.

The federal district court found that Ley quoted Jurek as stating, "he could not afford a lawyer and the court would have to appoint one for him." It disregarded the later testimony we have quoted, which is important to a full understanding of the "need for counsel" statement made by Jurek.

The principals involved in the interrogation of Jurek following his appearance before Judge Ley were De Witt County Attorney Robert Post, and District Attorney Wiley Cheatham, who later prosecuted the case at trial. Post testified at Jurek's trial as to the events surrounding the confessions, and Cheatham was deposed before the instant habeas corpus proceeding. As with the Ley testimony in the state court we may examine the entirety of their testimony, the district court below having considered only the bare transcripts.

After Jurek signed the Magistrate's Certificate, he and Cheatham made one trip to a place where Jurek said the body might be found. It was not discovered. Cheatham testified by deposition at the federal habeas corpus proceeding that as arrangements were being made to transfer Jurek to Victoria, Texas, for the night,

the accused asked to speak with him, and the process of obtaining a written confession began.[4] Post and Cheatham were present when Jurek gave the first written confession. Cheatham typed it himself, as it was given.[5] At 1:15 a.m., Jurek signed the confession. Two persons witnessed his signture, and one of them testified that he was warned of his rights again, and that the statement was voluntary. The district court noted County Attorney Post's testimony at the state

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[4]Under the provision of the Texas Code of Criminal Procedure governing the admissibility of confessions in effect at that time, it was obviously preferable for the prosecution to attempt the introduction of a written confession as opposed to an oral one. An oral confession was relevantly admissible under Tex.Code.Crim.Proc. Art. 38.22(1) if under subsection (a) it was "shown to be the voluntary statement of [an] accused taken in the presence of an examining court in accordance with law," or, under subsection (e), it included "a statement of facts [and] circumstances that are found to be true, which conduce to establish [the guilt of the accused], such as the finding of secreted or stolen property, or the instrument with which . . . the offense was committed." This version of article 38.22 was effective between August, 1967 and August, 1977.

[5]District Attorney Cheatham testified with regard to the first confession:

> Q Now, when you typed the statement, did you use his exact words? How did you—how did you arrive at that?
>
> A As nearly as possible.
>
> Q Did you omit anything that he said?
>
> A The problem in typing on of these statements is—ask if its in his words as near as I can type it. It was—you understand when they give these statements, they don't just start at the first and smoothly go all the way. They'll go along and back up and tell you seomthing and we've probably let him—and again, I'm talking about, about generals, about letting him breathe, well, talk all the way through and then back and say, we'll say okay. Let's start and get it down or something like that.

suppression hearing that Jurek had stated before signing that he did not want an attorney.

The first confession is composed of simple, ungrammatical prose. Jurek stated that he had asked Wendy Adams at the Cuero swimming pool to go riding in his truck, and that he had driven "out to Hell's Gate Bridge" with the girl in the back of the truck. Jurek recounted that at the bridge she had criticized his drinking, and Jurek's brother's neglect of his family. He stated that he had become enraged, and began choking her. When she was still, he threw her into the river. There was nothing to support a theory that Jurek had kidnapped the girl, or had attempted sexual relations with her.

The lack of such aggravating factors is crucial to an understanding of the events which followed. As the panel opinion noted, 593 F.2d at 675 n.4, under the relevant Texas Penal Code provision in effect at the time of this crime, the crime of murder could be "punishable by death only if an aggravating factor was present. *See* Tex.Penal Code Art. 1257(b)." (For current version, *see* Tex. Penal Code Ann. Art. 1903). Jurek was charged with having committed murder in the course of kidnapping and attempted rape. The first confession did not bear these accusations out, and examination of Wendy Adams' body yielded no suggestion of attempted rape or of any sexual contact.

Following his signing of the confession, Jurek was transferred to the jail at Victoria, approximately fifty miles away, for what we are told were security reasons. At about 10:00 a.m. the victim's body was found floating in the Guadalupe River. That afternoon Jurek was returned to Cuero for further interrogation. No court-appointed attorney was waiting. Cheatham testified as to his motivation for further questioning:

> Q I understand. What was the purposes of taking the second statement?

A Well, we found out there were parts of the first statement that we felt were incorrect, not true.

Q There's no question that this young man was reluctant as far as you recall, were concerned, to tell you the truth about what happened?

A Well, you're going to have to be—your statement is so broad I can't answer without giving you—or you could take several different views of what my answer was. If you'll be more specific.

Q Well, the first written statement he didn't—in your opinion, was—upon what you had heard and read about the case, he didn't tell you the whole truth about it?

A I questioned the truth, but I had to put it down like he gave it to me. I would have questioned it. In fact, I don't think—I think Mr. Middaugh has confirmed my suspicions about how bad it was, but I don't think he ever told us all of what I felt that he could have said. But again, I have to put it down, what he says, not what I think or feel like had happened.

Q Yes, but as far as the taking of the first statement that was in writing, was concerned, he was reluctant to tell you the whole truth in your opinion based upon what you knew about the case?

A Well, the way you're putting it, you're making it—I can't answer yes or no, I have to qualify—

Q He just didn't tell you, in your opinion, all the truth on this first statement?

A Well, I felt like there was sexual involvement all along, but he didn't say that so I couldn't put it in there. I wouldn't have put it in.

This testimony echoed that of Post at Jurek's trial:

> A We just felt that he knew more than what he was telling us, as to the reasons, and what-not.
>
> Q Was this just a feeling on your part?
>
> A Yes, sir.

On Jurek's return to Cuero, he was brought to Post's office. There, interrogation by Post, Cheatham, and several others began. Cheatham testified that:

> ". . . neither he [Post] nor I did much questioning. I more or less related to him that I felt a part of his statement was not correct, that I felt that there was sex or things like that involved and he was pretty brief and he said, well, I'm going to stand on my first statement and I said well, if that's the way you feel and I had a hard long day and I got up and went out to the hall."

Post recounted at the state trial that after Cheatham left, Jurek indicated that he wanted to talk. Cheatham returned, and Jurek was taken to his office. The second confession was written in longhand by Post, and typed by Cheatham's secretary. Post testified that he put Jurek's own words down, "as near as possible as I could . . ."

The correct grammar and composition of this confession are, however, vastly different from those of the first. It would be impossible to conclude that the same person gave each confession verbatim. The panel majority quoted a sentence in the second confession: "in the statement that I gave him I did not tell the truth about the conversation I had with Wendy at the river and the prior discussion about trying to find some girls to pick up and I now herein wish to correct that statement." It did not, however, note the facial distinction between the two statements. The district court did not mention the composition of either.

In the second confession Jurek stated that he had strangled the child after she refused to have sexual relations with him. Post was questioned as to whether Jurek was informed of the import of this statement:

> Q . . . But did you really explain to the defendant what the effect of this statement was? Did you at any time tell the defendant that if he signed this second statement he was sending himself to the electric chair?
>
> A No, Sir. I don't think I did.

Not having been informed of its significance, Jurek signed what was in effect his death warrant. At the time he did so he had been in custody forty-two hours and had seen neither his parents, nor a lawyer.

TRIAL, APPEALS, AND HABEAS CORPUS

Counsel for Jurek was appointed by Judge Ley after the second confession had been signed. The appointment was confirmed by State District Judge Kelly. The attorneys, George Middaugh and Emmett Summers III, moved to suppress the written confessions. Their motion was denied, and both confessions were admitted. Jurek was convicted of murder, and was sentenced to death in the punishment phase of his trial, under the bifurcated Texas system.

The Texas Court of Criminal Appeals affirmed, rejecting an argument that the confessions were involuntary. *Jurek v. State*, 522 S.W.2d 934, 942-43 (Tex.Cr.App. 1975). The Supreme Court granted certiorari, 423 U.S. 238, but only on the issue of the validity of the Texas death penalty statute. It affirmed, holding the state law constitutional. *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). The action of the Court of Criminal Appeals in upholding the admission of the confessions had been complained of in Jurek's petition for certiorari.

After the Supreme Court denied rehearing, the state district court formally sentenced Jurek, and set his execution for January 29, 1977. Petitions for habeas corpus were denied by the state trial court and the Court of Criminal Appeals on January 10th and 11th. On January 12th petitioner filed an application for a stay of execution in the Supreme Court, and on January 13th he filed a stay application and an application for a writ of habeas corpus in the United States District Court for the Southern District of Texas. On January 17th, the Supreme Court granted a stay pending the filing of a petition for certiorari. It denied certiorari on March 28th, stating:

> "Without intimating any views on the merits of the questions presented to the United States District Court for the Southern District of Texas in petitioner's pending application for a writ of habeas corpus, [the] petition for [a] writ of certiorari [is] denied. . ." 430 U.S. 951, 97 S.Ct. 1592, 51 L.Ed.2d 800 (1977).

The federal district court then granted a stay of execution on March 30th and began consideration of the habeas corpus application.

The application was based on numerous grounds, the voluntariness of Jurek's confessions and the *Witherspoon* issue among them. The district court held an evidentiary hearing at which three doctors and one of Jurek's trial attorneys testified.

The doctors' testimony went to one important facet of this case, the issue of Jurek's mental capacity. The district court found that "testimony at the evidentiary hearing, as well as expert testimony during the trial of Jurek, established that petitioner is an individual of below-average intelligence, mildly retarded, with possible organic brain damage." In another part of the opinion, it stated that "[J]urek's intelligence is below average, or 'dull normal.'" While the medical testimony

was in some conflict, and the quoted conclusions may somewhat overstate the extend of Jurek's mental limitations, we cannot say that these holdings were clearly erroneous.

The district court, on the basis of its evidentiary hearing and briefs submitted by the parties, denied the habeas corpus application in an unpublished memorandum opinion. A panel of this court, cited *supra*, concluded that under the totality of the circumstances both confessions were involuntary, and that error in the state court under the *Witherspoon* doctrine also mandated a new trial. Chief Judge Coleman dissented, arguing that both confessions were voluntary, and that the *Witherspoon* issue should not be reached. A petition for rehearing en banc was granted by a majority of the judges then on this court. *Jurek v. Estelle*, 597 F.2d 590 (5 Cir. 1979).

CONSTITUTIONAL STANDARDS

The panel majority opinion provides an exhaustive survey of the case law relating to the voluntariness of confessions. *See* 593 F.2d 676-79. We do not dispute the validity of the principles stated therein, but differ only on their application to the facts of this case.

The panel majority noted that there is no "talismanic" test yielding a formula for a mechanical determination of voluntariness. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224, 93 S.Ct. 2041, 2046, 36 L.Ed.2d 854 (1973). It recited a number of expressions by the Supreme Court of the fundamental requirements for voluntariness.[6]

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[6]The panel opinion recites, 593 F.2d 672 at 676:

> To be voluntary a confession must be "the product of an essentially free and unconstrained choice." *Columbe v. Connecticut*, 367 U.S. 568, 602, 81 S.Ct. 1860, 1879, 6 L.Ed.2d 1037 (1961). The decision to confess must be "freely self-determined," *Rogers v. Richmond*, 365 U.S.

Those statements may be synthesized to require that in order to find Jurek's confession voluntary, we must conclude that he made an independent and informed choice of his own free will, possessing the capability to do so, his will not being overborne by the pressures and circumstances swirling around him. The burden of proving facts which would lead to an opposite conclusion is on the habeas corpus applicant. *Bruce v. Estelle*, 536 F.2d 1051 (5 Cir. 1976).

This is, necessarily, a case-by-case endeavor. We must weigh the totality of the circumstances and examine their impace on Jerry Lane Jurek as to each of his confessions, guided by those cases which have identified factors, "red flags" which will arouse the suspicion and close scrutiny of the reviewing court. *See Fikes v. Alabama*, 281, 284, 1 L.Ed.2d 246 (1957). We must determine whether the sum of the circumstances compels a finding of involuntariness.

It has been repeatedly argued that the confessions are simply the truth, and the state has frequently invoked the brutality of the crime. We are bound by our oaths to bar such considerations from our decision of this case. "We are not called upon in this proceeding to pass on the guilt or innocence of the petitioner of the atrocious crime that was committed." *Davis v. North Carolina*, 384 U.S. 737, 739, 86 S.Ct. 1761, 1763, 16 L.Ed.2d 895 (1966). The issue of voluntariness must be addressed "with complete disregard of whether or not petitioner in fact spoke the truth." *Rogers v. Richmond*, 365 U.S. 534, 544, 81 S.Ct. 735, 741, 5 L.Ed.2d 760 (1961).

534, 544, 81 S.Ct. 735, 741, 5 L.Ed.2d 760 (1961), "the product of a rational intellect and a free will," *Blackburn v. Alabama*, 361 U.S. 199, 208, 80 S.Ct. 274, 280, 4 L.Ed.2d 242 (1960). The defendant's "will to resist," *Rogers v. Richmond*, 365 U.S. at 544, 81 S.Ct. at 741, must not be overborne; nor can his "capacity for self-determination [be] critically impaired." *Culombe v. Connecticut*, 367 U.S. at 602, 81 S.Ct. at 1879.

The panel relied on a number of factors in reaching its conclusion of involuntariness. It noted Jurek's limited verbal intelligence, and the problem of "suggestibility" flowing therefrom. Secondly, it relied upon a conclusion that Jurek's confessions were apparently not in his own words. Third, it took into account the "manifest attitude" of the prosecutors toward Jurek, as reflected by their actions. Emphasis was placed upon Jurek's partial lack of clothing when taken into custody, the movements from Cuero to Austin to Cuero and to Victoriak, and that the accused saw neither counsel nor family for forty-two hours, covering the period in which the confessions were given. The majority fourthly identified the failure to appoint an attorney immediately following Jurek's "request" before the magistrate. Finally, it was noted that the prosecuting authorities did not "relent" following Jurek's first confession, evincing a "purposeful interrogation" directed not toward solving the crime, but to securing a statement on which they could convicte [or enhance the punishment of] Jurek. On reconsideration en banc, it is instructive to begin by examining each of these factors.

JUREK'S MENTAL LIMITATION

In considering the voluntariness of a confession, this court must take into account a defendant's mental limitations, to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confession was not a product of his own free will. The Supreme Court has made clear that such an inquiry involves "a weighing of the circumstances of pressure against the power of resistance of the person confessing." *Stein v. New York*, 346 U.S. 156, 185, 73 S.Ct. 1077, 1093, 97 L.Ed. 1522 (1953). The concern in a case involving a defendant of subnormal intelligence is one of suggestibility. *See Sims v. Georgia*, 389 U.S. 404, 88 S.Ct. 53, 19 L.Ed.2d 634 (1967); *Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961); *Fikes v. Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957). Doubtless, if the

prosecutors pursue a specific object in the interrogation of such an accused, and the resulting confession bears the precise fruit of their aims, it will be doubly suspect.

In this case, the district court did not find, and the record would not support a finding that Jurek was so mentally deficient that his confessions must necessarily be held involuntary, or that he could not understand the circumstances surrounding his interrogation and confession. Questions of suggestibility and possible overreaching are raised, however, and must be factored into a consideration of the totality of the circumstances.

THE COMPOSITION OF THE CONFESSIONS

We have noted that there is an obvious facial distinction between the two confessions. The first statement could plausibly be attributed to Jurek's own words. We must view incredulously, however, any suggestion that the second confession came directly from the accused. It is noteworthy that the second was taken in longhand by a prosecutor and then typed.

The panel majority was doubtless correct in its statement that prosecution-composed confessions are highly suspect, particularly where the accused is of below normal intelligence, citing *Spano v. New York*, 360 U.S. 315, 322, 79 S.Ct. 1202, 1206, 3 L.Ed.2d 1265 (1959); *Blackburn v. Alabama*, 361 U.S. 199, 204, 207-08, 80 S.Ct. 274, 278, 280, 4 L.Ed.2d 242 (1960); *Fikes v. Alabama*, 352 U.S. 191, 195, 77 S.Ct. 281, 283, 1 L.Ed.2d 246 (1957). As to the first confession, we have undisputed testimony that it was taken word for word as closely as possible, and a document that, from the four corners, does not contradict the testimony. With the second confession, however, we have the same testimony, but a document which could not have been attributed to the author of the first, is far too sophisticated in its grammar to be consistent with the medical testimony concerning Jurek's intelligence, and contains, as the panel majority noted, "even a touch of

legalese." We will, accordingly, look on the second confession with that suspicion mandated by the Supreme Court.

JUREK'S "REQUEST" FOR COUNSEL

The panel majority placed great emphasis on Jurek's statement before the magistrate that he could not afford a lawyer and that the court would have to appoint one for him. Noting that the district court had held that Jurek's rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1965), were not violated by the failure to appoint counsel immediately, the panel majority cited *United States v. Priest*, 409 F.2d 491 at 493 (5 Cir. 1969), for the proposition that "any subsequent 'waiver' of counsel—such as the statement Jurek made to the county attorney before his first confession—has no legal significance." 593 F.2d at 679. However, it expressly declined to "decide whether the magistrate's inexplicable failure to appoint counsel, and the subsequent continued interrogation, formally violated *Miranda*;" rather, it considered the matter "to be further evidence of the involuntariness of his confessions." *Id.*

The district court concluded that "Jurek told the magistrate that he could not afford counsel . . . It is not clear that Jurek *asked* for counsel at that time." and found that "[T]he record in this case shows conclusively that Jurek was asked if he wanted counsel, but Jurek clearly declined the right to counsel."

We agree that the question should be considered as evidence of involuntariness. We believe, however, that the district court's findings were correct, and that they both negate any conclusion that *Miranda* was violated, and demonstrate the minimal effect of the lack of immediate assistance on the voluntariness issue.

Priest, relied on by the panel majority, announced a *per se* ruling holding any waiver of counsel ineffective after a request for assistance was made. The rule of

Priest was limited by this court, sitting en banc, in *Nash v. Estelle*, 597 F.2d 513 (1979). There, the court construed *Priest* to bar any inquiry as to waiver where a request for counsel in *unequivocal*, and when the request is *disregarded* and questioning proceeds. 597 F.2d at 517. It was further held that where a suspect has been informed of his rights and expresses both a desire for counsel and a wish to continue the interview without immediate assistance, it is proper for the authorities to make further inquiry to clarify his wishes. *Id. Priest* involved an inequivocal request for counsel, and therefore this case is far closer to *Nash*. In a recent decision involving a factual situation similar to the one before us, the opinion of this court *per* Judge Roney contains an exhaustive analysis of these cases and reaches the same conclusion we make here. *Blasingame v. Estelle*, 604 F.2d 893 (5 Cir. 1979).

Whenever a question of waiver of counsel arises, a federal court must look to the totality of the circumstances surrounding the alleged waiver to determine whether, in truth and in fact, a knowing waiver occurred. Under this analysis we cannot consider Jurek's statement to Judge Ley in naked isolation. Rather, it must be read in conjunction with his later remarks that he did not desire counsel upon being asked if one should be secured *then*. This clarification was permissible under *Nash*, for the import of Jurek's first statement was that he could not afford a lawyer and would eventually need one. It was not an unequivocal request.

Therefore, we are not faced with a situation where a request for counsel was denied or ignored. Rather, the authorities did not independently, and against Jurek's clearly expressed desire to proceed without counsel, appoint a lawyer immediately. This, and no more, must be considered along with the other events in passing judgment on the voluntariness of these confessions.

PROSECUTORIAL MOTIVATION

We must be alert, as the panel majority stated, to the "manifest attitude" of the police toward the defendant. *Culombe v. Connecticut*, 367 U.S. at 602, 81 S.Ct. at 1879; *Smith v. Heard*, 315 F.2d 692, 694 (5 Cir. 1963). The Supreme Court has mandated "the most careful scrutiny" where the primary aim of prosecutors was "securing a statement from defendant on which they could convict [the defendant]" as opposed to solving the crime. *Spano v. New York*, 360 U.S. at 323-24, 79 S.Ct. at 1207. We must also bear in mind the principle that a "presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties." *Nash v. Estelle*, 597 F.2d at 518, quoting *United States v. Chemical Foundation*, 272 U.S. 1, 14-15, 47 S.Ct. 1, 6, 71 L.Ed. 131 (1926).

Before Jurek's lie detector test, the primary concern of the authorities appears to have been the safe recovery of the little girl. After Jurek's oral confession, it seems to have shifted logically toward determining the exact circumstances of her death, Jurek's role in it, and to finding the remains. There is nothing in the record to suggest a drive toward Jurek's confession. After having been warned, he had already done so. He was taken before a magistrate promptly on returning from the polygraph examination, and soon after gave the first written confession. The district attorney testified that the written confession was taken after Jurek *sent for him*. In a very real sense, the first written confession was stands in place of the earlier oral one. That first oral expression of guilt was paidly supplanted by the written version, and the fact that counsel was not appointed at the intervening magistrate's hearing has little impact, as discussed *supra*.

As to the second confession, however, there is ample evidence of a prosecutorial "drive for the death penalty."

The dimly articulated dissatisfaction of Cheatham and Post with the first confession, and their "feeling" that sex was involved, led them to bring Jurek back to Cuero for further interrogation. They already had a valid confession from Jurek, and the little girl's body showed no sign of sexual contact. They suggested to Jurek that they thought the first confession was incomplete and that sex had been involved, and did not explain the deadly effect of his signature on the second confession.

The panel majority mentioned these efforts in considering the motivation of the prosecutors, and its comments were limited to events surrounding the second confession:

> "When they questioned Jurek in an effort to elicit his second confession, the authorities were not trying to find Wendy Adams, for they had already found her body; they were not even trying to find out who killed her, for Jurek had already confessed to that. It is difficult to resist the conclusion that they were trying to gain the evidence that would send Jurek to his death." 593 F.2d at 679.

OTHER FACTORS

Of those other actions by prosecuting authorities cited by the panel majority to support its conclusion, no single event is sufficient to place the stamp of involuntariness upon Jurek's confessions. His lack of clothing at his first interrogation must be considered in terms of the totality of the circumstances. The transfer of Jurek to Austin occurred at his own request, and the move to Victoria was apparently motivated by security reasons. That he saw neither his family nor an attorney through the execution of the second confession is indeed significant. However, as the first confession was given only twenty-four hours after his arrest and less than ten hours after his oral confession in Austin, the issue of isolation bears more on the second confession, made over forty hours after his arrest.

Having examined each of the factors which have been held by the panel to taint Jurek's confessions, we proceed to a consideration of their total effect on each confession.

THE FIRST WRITTEN CONFESSION

There is little to indicate that this document was involuntarily given. It was given after Jurek was given repeated warnings of his rights. It was given after he was accorded a lie detector test at his own request, at which he gave an oral confession. He had been before a magistrate, who again read him his rights, and explained them. While Jurek stated that he could not afford counsel, he also stated that he did not need one at that time. Examining the full range of circumstances under the totality approach, it is obvious that Jurek knowingly waived counsel before the first confession, particularly where he had been warned of his rights, and was doing no more than giving a written version of an oral confession made when no charges had been filed against him. Further,it cannot be held that the authorities, who had just secured an oral confession, who had warned Jurek of his rights and were met with firm statements that the accused did not want counsel at that time, should have ignored the waiver and appointed an attorney anyway. The confession appears to be in Jurek's words. There is little to indicate that the prosecutors were striving for any result other than the solution of the crime and the recovery of Wendy Adams' remains. It cannot be held that the totality of the circumstances reveal that this confession was not given of Jerry Lane Jurek's free will.

THE SECOND CONFESSION

The circumstances are vastly different with regard to the second confession. We have mentioned that the authorities hauled Jurek back to Cuero for renewed interrogation which produced exactly the confession they desired. This document contradicted the first

confession and could not conceivably have been composed by Jurek. There is no indication that he was informed of the importance of the second confession. When Jurek's limited intelligence is factored into our consideration, it becomes evident that he could not have understood the gravity of his act in the absence of legal counsel. No court-appointed attorney worth his salt would have allowed Jurek to sign the second confession.

Other factors intervene to bolster an inescapable conclusion that the confession was involuntary. When the first was given, he had been in custody less than twenty-four hours, little of which had been spent in actual interrogation. He had confessed orally only that afternoon. By the time the second was signed, he had been out of contact with the outside world for over forty hours. The disapproval of those in control of his environment had been expressed to him, and they had suggested the direction in which they wished him to travel. We give relevance to the failure of the authorities to inform Jurek that the statement they sought embodied a factor which entailed the sentence of death only in that awareness of that fact would almost certainly have prevented a man in Jurek's situation from wearily accepting a suggested untruth, feeling that he had already sealed his fate via the first confession to murder. Considering that Jurek had been in custody and isolated for almost two days, that a valid confession solving the crime had been obtained, that the investigation had taken on, in a suggestive manner, the purpose of amending that confession to secure the death penalty, and that a defendant such as Jurek was surely incapable of considering the effect of the amendment without help, the authorities should have ignored the waiver of immediate assistance and acted on Jurek's latent expression of "need" for counsel before the magistrate, or, at the very least, informed him of the significance of the information sought. Professional prudence and respect for Jurek's constitutional rights demanded no less.

CONCLUSION

In holding one confession to be valid and another invalid under the constitution, we are in accord with the purpose and theory of appellate review of voluntariness issues. We sit to review the sum of the facts, and to determine if, and at what point, the totality of those facts renders a confession so suspect that to admit it into evidence would deny the defendant due process of law, and contravene the prohibition against compelled self-incrimination found in the Fifth Amendment.

That point will shift from case to case, dependent upon the presence or absence of factors suggesting coercion, intimidation, overreaching, or the deprivation of rights secured by the constitution, which combine to defeat the free and independent exercise of the will of an accused. As the panel majority noted, ". . . at some point the pressure can become too insistent; we can then say that the responses elicited are involuntary." 593 F.2d at 676. Here, there are almost no indicators pointing to an involuntary first confession. In the case of the second, the factors suggesting involuntariness predominate.[7]

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[7]It must be stressed that our holding breaks very little new ground, if any, in terms of the law concerning voluntariness; under the totality test, we have considered factors which have been established as relevant to this inquiry. The absence of one or more of them might have compelled a contrary result. The precise holding of this opinion, based on an analysis of the cumulative impact of these factors, is no more or less than the following: Where a (1) mentally deficient accused, who was (2) functionally isolated from all but his interrogators, (3) who was not assisted by counsel, (4) and who had executed a valid confession to murder, essentially solving the crime under investigation, was (5) the subject of continuing purposeful and suggestive interrogation directed (6) toward an amendment of his earlier confession to include information so minimally suggested as to amount to a prosecutorial "hunch," the renewed interrogation producing (7) a confession which is facially suspect and which (8) achieves the precise result sought by the prosecutors, (9) enhancing, in a manner unknown to the accused, the potential penalty to that of death, a consideration which would

Mr. Justice Frankfurter once observed that the problem of voluntariness involves considerations both of "liberty" and "security." Culombe v. Connecticut, 367 U.S. at 578, 81 S.Ct. at 1865. We are mindful of Justice Frankfurter's admonition that the conviction is "basic to our legal order, that men are not to be exploited for the information necessary to condemn them before the law, [and] that, in Hawkin's words, a prisoner is not to be made the deluded instrument of his own conviction." *Id.* at 581, 81 S.Ct. at 1867. We are also mindful of the necessities and difficulties of effective law enforcement, in which the confession may be an essential and fair device for the protection of the public. We have found that in their efforts to secure such protection by ensuring that Jurek was condemned, the law enforcement authorities ran far too high a risk of making him the deluded instrument of his own execution.

Therefore, the judgment of the District Court is REVERSED, and the cause is REMANDED with directions to grant the writ of habeas corpus, Jurek being entitled to a new trial without the use of his second confession.[8]

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cause any person made aware of it to pause and carefully consider the truthfulness of any additional information suggested, the risk of involuntariness is so great that the confession cannot be admitted in consistency with due process guarantees and the privilege against self-incrimination.

[8]As was stated *supra*, we declined to pass on an assertion that violations of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) occurred during voir dire at Jurek's trial. We note that the Supreme Court has recently passed upon the applicability of *Witherspoon* to Texas voir dire procedures, in *Adams v. Texas*, ___ U.S. ___, 100 S.Ct. 2521, 64 L.Ed.2d ___ (1980). We are confident that upon any retrial of Jurek the state courts of Texas will act in full compliance with the teachings of *Adams*.